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No. 89-724

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF SOUTH DAKOTA, *et al.*, PETITIONERS

v.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *et al.*, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENTS KANSAS CITY SOUTHERN INDUSTRIES, INC. AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

1. (a) Whether the Court of Appeals erred in failing to create a new and unique interpretation of § 4 of the Clayton Act in order to grant antitrust standing to the state governmental plaintiffs in this case?

(b) Whether the Court of Appeals correctly applied the test for antitrust standing, established in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), to the facts of this case?

2. Whether this Court's decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931 (1988), overruled *sub silentio* this Court's holdings in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and rewrote the legal test for determining when petitioning is sham?

3. Whether the Court of Appeals violated the Seventh Amendment right to a jury trial by reviewing the sufficiency of the evidence on questions for which there was no jury finding?

PARTIES TO THE PROCEEDING

A list of the parties below is contained in the Petition. The following is a statement of the parents, subsidiaries (except for wholly owned subsidiaries) and affiliates of the respondents Kansas City Southern Industries, Inc. and The Kansas City Southern Railway Company, provided pursuant to Rule 28.1 of this Court's Rules:

ALC Communications, Inc.; Argus PMS; Boston Financial Data Services, Inc.; Direct Broadcast Satellite Corp.; Downtown Investors; DST Computer Services S.A.; DST Systems, Inc.; Fast Foto, Inc.; First of Michigan; IDEX Management, Inc.; International Satellite, Inc.; Investors Fiduciary Trust Company; Janus Capital Corporation; Joplin Union Depot Co.; KC Terminal Railway Company; The Lamarck Group; LDX Group, Inc.; Northern Farms, Inc.; Ocean Lagoon Assoc.; Plaza Investors; Port Arthur Bulk Marine Terminal Co.; Rycom Instruments, Inc.; 10 Central Garage Associates; TPM Europe, Inc.; Trailer Train Company; Transaction Services, Inc.; Two Heritage Drive Realty Association; Vantage Computer Systems, Inc.; WilTel/LDX Acquisition Corp.; Winchester Venture I; Winchester Venture II; Wyandotte Garage Corp.

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BRIEF OF RESPONDENTS KANSAS CITY SOUTHERN INDUSTRIES, INC. AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY IN OPPOSITION

Respondents Kansas City Southern Industries, Inc. and The Kansas City Southern Railway Company (collectively "KCS") respectfully submit this Brief in Opposition to the Petition of the State of South Dakota and the South Dakota Conservancy District (collectively "South Dakota") for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case, reported at 880 F.2d 40. *See* SD App. A.

STATEMENT OF THE CASE

South Dakota's factual statement of the case frequently goes beyond the facts found by the jury (*see* SD App. 64a-68a) or supported by the evidence presented to the

jury. KCS does not undertake here to dispel all the misconceptions that might be created by this advocate's account because the facts that South Dakota embellishes are not relevant to the factual points upon which the decision below rests.

A. Statement of the Facts

The complaint in this action was based on an agreement between South Dakota and Energy Transportation Systems, Inc. ("ETSI") under which South Dakota was to be paid for supplying water from the Oahe Reservoir to ETSI. ETSI planned to use the water in the operation of a coal slurry pipeline it contemplated constructing from Wyoming to some point in the south-central United States. ETSI abandoned its plans to construct the pipeline and cancelled its contract with South Dakota in 1984. South Dakota brought this action against KCS seeking the value of that contract as compensatory damages.

ETSI required large quantities of water for its proposed coal slurry pipeline. Initially, ETSI planned to use wells in Wyoming to draw water from the Madison Formation Aquifer, and South Dakota, objecting to this use, actively opposed the pipeline for a number of years. SD App. 3a, 15a. For example, South Dakota filed comments critical of ETSI's Environmental Impact Statement. SD App. 5a. Eventually, however, South Dakota convinced ETSI to switch water sources, and on December 23, 1981, ETSI signed a contract with South Dakota (the "ETSI/South Dakota contract") whereby South Dakota promised to assign ETSI a state water permit and ETSI promised to pay South Dakota, subject to cancellation rights, for its use of Oahe water. Because the Oahe Reservoir is a federal flood control project, ETSI also sought federal approval; in 1982, it signed a water service contract with the Bureau of Reclamation ("BOR") of the Department of the Interior (the "ETSI/BOR contract").

In its complaint, South Dakota alleged that KCS interfered with the ETSI/South Dakota contract by acting together with other railroads to inhibit the construction of ETSI's proposed pipeline. The complaint raised claims under the antitrust laws and for tortious interference with contract under South Dakota law. South Dakota alleged that KCS sent letters, comments and objections to various state, local and federal governmental agencies in opposition to the pipeline, and most notably, that KCS brought a federal lawsuit seeking, *inter alia*, to enjoin the ETSI/BOR contract for the use of Oahe water. KCS and several other private parties filed the lawsuit against ETSI and various officials of the federal government in July of 1982.

At the same time, the States of Iowa, Nebraska and Missouri filed a similar lawsuit also seeking to enjoin the ETSI/BOR contract. The district court consolidated KCS' suit and the States' suit. The consolidated suit—known as the "*Andrews*" litigation—was completely successful. The federal courts concluded that the BOR had no authority to issue ETSI a federal permit to use Oahe water; ultimately this Court unanimously upheld a permanent injunction against execution of the ETSI/BOR contract. *See Missouri v. Andrews*, 586 F. Supp. 1268 (D. Neb. 1984), *aff'd*, 787 F.2d 270 (8th Cir. 1986), *aff'd sub nom., ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988) ("*Andrews*").[1]

B. The Proceedings Below

The case was tried to a jury for ten weeks in early 1988. The jury returned a verdict in the form of 12 answers to questions posed to it on a special verdict form

[1] The Petition notes that "the District Court [in *Andrews*] ruled that KCS had no standing" to challenge the ETSI/BOR contract. Pet. at 8. The Petition fails to inform the Court that this ruling was later vacated by the District Court and that the Court below found that KCS had a reasonable basis for asserting standing in *Andrews*. *See* SD App. 27a-28a & n.29.

submitted under Fed. R. Civ. P. 49(a). As to the claim under § 1 of the Sherman Act, 15 U.S.C. § 1, the jury found that KCS had acted in concert (with others not specified) to delay or impede the pipeline project, that KCS' conduct resulted in a restraint in the coal transportation market, and that South Dakota's harm was causally connected to KCS' conduct. SD App. 64a-65a. As to the tortious interference claim, the jury found that KCS' actions after it knew of the existence of the ETSI/South Dakota contract (including the *Andrews* litigation) were a cause of ETSI's termination of that contract, and that these acts were intentional and collectively caused harm to South Dakota. SD App. 66a-67a.

Despite KCS' objections, no question was posed to the jury concerning the *Noerr-Pennington* doctrine,[2] and the Court did not instruct the jury to limit its consideration of causation only to conduct unprotected under that doctrine. *See* KCS App. 4a. Consequently, the jury's findings on the verdict form do not address these issues. *See* SD App. 64a-68a.[3]

On the basis of the jury's answers on the special verdict form, including its estimate of the present value of the ETSI/South Dakota contract had it been performed for 50 years, SD App. 67a-68a, the trial court entered judgment against KCS. SD App. 69a-70a.

The Eighth Circuit made three determinations that required the reversal of the judgment. First, the Court

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[2] *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). *The Noerr-Pennington* doctrine exempts from antitrust scrutiny certain petitioning conduct directed to governmental officials notwithstanding the existence of all the elements necessary to constitute an antitrust violation for non-petitioning conduct.

[3] Contrary to the suggestion of the Petition (at 7), the jury never found that KCS' participation in *Andrews* (or any other petition) was sham, or that sham activity proximately caused South Dakota injury. *See* discussion below at 25-26.

determined that South Dakota had no standing to pursue its antitrust claim under § 4 of the Clayton Act, 15 U.S.C. § 15. The Court identified six standing factors articulated in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), and applied those factors to the facts of this case. SD App. 10a-20a.

The Court then dismissed the state law claim for tortious interference with contract for two independent reasons. Based on the record below, the Court held that, as a matter of law, KCS' activities from the date the contract was signed until the date of its cancellation [4]

> (1) had no significant or proximate causal relation to the cancellation by ETSI of the [South Dakota]/ ETSI contract, and, even if they did contribute to the cancellation of the contract, (2) KCS' activities in the *Andrews* litigation were protected by the *Noerr-Pennington* doctrine.

SD App. 27a. In making the first determination relevant to the tort claim—that South Dakota failed to prove proximate causation as a matter of state tort law—the Court observed that the record was clear that "the district court's decision in *Andrews* was the single most important event immediately preceding the termination of the ETSI coal slurry pipeline project." SD App. 25a. The Court concluded that the *Andrews* decision and any effects of the suit were independently caused by the States of Iowa, Missouri and Nebraska, without regard to KCS' participation. SD App. 28a.

As an alternative to this holding, the Court considered whether KCS' participation in *Andrews* could have been "improper" under South Dakota tort law. The Court held that petitioning of the government could not be "improper" under state law—and thus could not serve as the

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[4] The parties agreed that KCS' pre-contractual conduct could not serve as a basis for liability for tortious interference with contract. *See* SD App. 24a-25a, 36a.

basis for tort liability—unless it were "sham" under the *Noerr-Pennington* doctrine. SD App. 21a-23a. The Court held that KCS' *Andrews* petition, as a matter of law, was not sham because there was no evidence that KCS participated in *Andrews* without sincerely intending to obtain judicial relief. SD App. 28a-31a.

The Court of Appeals denied South Dakota's request for rehearing or rehearing *en banc*.

REASONS FOR DENYING THE PETITION

The Petition for Certiorari criticizes, directly or obliquely, every aspect of the Eighth Circuit's opinion. These criticisms are not confined to matters raised in or decided by the Court below; many are either mentioned for the first time in the Petition or are directed at questions not presented by the Eighth Circuit's decision. None of the bases of that decision presents an important and controversial question of federal law, addresses an issue as to which a conflict exists in the lower federal courts, or conflicts with any decision of this Court. As to each question, the Court of Appeals for the Eighth Circuit applied the law as articulated by this Court and as it has uniformly been applied by other Courts of Appeals. The Court of Appeals directed that judgment be entered for KCS only because the record supports no other result. Review by this Court is not warranted.

I. THE DECISION BELOW APPLIED SETTLED PRINCIPLES OF ANTITRUST STANDING

A. The Court Below Properly Treated South Dakota In The Same Manner As Other Plaintiffs Proceeding Under § 4 Of The Clayton Act

South Dakota begins its argument by making a suggestion not previously raised in any brief filed in this action—that a state seeking to recover for commercial

injury should not be bound by the same legal standard [5] as other "persons" proceeding under § 4 of the Clayton Act, 15 U.S.C. § 15. South Dakota apparently now believes that "the status of a state *broadens* the scope of its commercial interests deserving of protection under the antitrust laws." Pet. at 12 (emphasis in original). The Eighth Circuit not surprisingly applied the same law to South Dakota as it would to any "person" seeking recovery under § 4 of the Clayton Act. *See, e.g., Georgia v. Evans*, 316 U.S. 159, 162 (1942) (Georgia is a "person" under the antitrust laws, entitled to "the civil remedy of treble damages which is available to *other purchasers* who suffer through violation of the [Sherman] Act") (emphasis added).

In support of its claim that the Eighth Circuit erred in failing to create a new rule of law affording it a special "status" under the federal antitrust laws, South Dakota cites not a single case or excerpt of legislative history, and provides no analysis of the language of § 4 of the Clayton Act. Section 4 simply provides its protections to "person[s]" injured in their "business or property;" it does not purport to give states any greater or lesser "commercial" rights than it provides other persons. South Dakota's *ipse dixit* assertion that the commercial interests of states are somehow broader than those of private, purely commercial plaintiffs is a *non sequitur*: the existence of *non*-commercial (*i.e.*, sovereign) interests offers no logical ground for recognizing a broader commercial interest.[6] The only case South Dakota cites concededly

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[5] At argument before the Eighth Circuit, South Dakota attempted to point out factual differences between itself and other suppliers; it never argued for or articulated a different *legal standard* for state governmental antitrust plaintiffs.

[6] That a state may have "special status . . . under the Constitution" (Pet. at 11) does not support the proposition that states have broader rights under § 4 of the Clayton Act. If anything, states

does not support its argument. *See Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972) ("*Hawaii*") (states may not recover as *parens patriae* for injury to their non-commercial interests). South Dakota does not even hint at what it believes the legal standard for antitrust standing for states should be—other than to note that it would be "broade[r]" than that for private entities—or explain whether it would meet such a standard.

At most, South Dakota can suggest only that this Court use the present case as a vehicle to reconsider the *Hawaii* opinion. Pet. at 12. This case does not, however, present the issue decided in *Hawaii*. The Court of Appeals below did not cite *Hawaii* or rely on the decision in any manner; nor did it hold that South Dakota lacked standing to recover for injury to its sovereign interests—as this Court did in *Hawaii*. Rather, it held that South Dakota did not have standing to recover for injury in its commercial capacity because it failed the general antitrust standing test of *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). *See* discussion below at 9-13.

To the extent a state should possess any special status under the federal antitrust laws, Congress has already struck that balance by enacting the specific *parens patriae* provisions of § 4C of the Clayton Act, 15 U.S.C. § 15c. South Dakota sought to proceed *parens patriae* in the district court, but that aspect of its suit was dismissed (SD App. 47a-51a), and that ruling was not appealed. The Court of Appeals therefore had no occasion to consider that ruling, which in any event was correct. That Congress has made special provision for states

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are less dependent on federal remedies than private plaintiffs. States are uniquely situated to fashion and pursue their own causes of action directed at particular conduct, as South Dakota pursued its tort claim here.

through legislation (in the enactment of § 4C) undermines the notion proposed by South Dakota that this Court by decision should make further special provision for the states by inventing a new construction of § 4 for their unique benefit. There is no reason for this Court to disturb the enforcement structure created by Congress, and South Dakota makes no attempt to offer one.

Finally, South Dakota's unhappiness with the level and focus of federal antitrust enforcement (*see* Pet. at 12) should be addressed to another forum; this dissatisfaction has little to do with whether this Court should expand the availability of a private federal damage remedy for the peculiar benefit of state governmental entities. Federal enforcement efforts undoubtedly do shift from time to time. This Court cannot be expected to adjust the scope of the § 4 remedy each time a perceived shift occurs. South Dakota cannot reasonably or logically complain because under § 4 of the Clayton Act it is held to the same standards as everyone else.

B. The Court Below Applied The Proper Legal Test To Determine Antitrust Standing And Did Not Give Dispositive Weight To Any One Factor

In its second attack on the Eighth Circuit's standing analysis, South Dakota argues that the Court of Appeals misapplied the analysis of *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*Associated General Contractors*"). South Dakota does not allege that the Court of Appeals failed to identify the proper elements of that analysis. South Dakota's only real complaint is that the Court below applied the correct law to the facts, weighed the legally relevant factors, but reached what South Dakota regards as the "incorrect" result. This Court should decline the invitation to delve into what South Dakota candidly admits is a "fact-intensive inquiry" (Pet. at 13).

South Dakota attempts to convert this factual inquiry into a legal issue, asserting that the Court below committed "clear error" by giving "decisive effect" to one of the several factors identified by *Associated General Contractors*: the fact that South Dakota was not a participant in the market relevant to its antitrust claim. KCS allegedly caused a decrease in competition in the coal transportation market. South Dakota now appears to concede (as the record below demonstrates, *see* SD App. 15a-17a) that it was not a participant in that market, *i.e.*, it neither bought nor sold coal transportation services; it was neither a consumer nor a competitor in that market. South Dakota contends that the Court of Appeals improperly treated this "single issue" as dispositive and "ignored other significant factors." Pet. at 13.

South Dakota has markedly mischaracterized the decision below. South Dakota can cite no portion of the decision showing that the Court gave any single factor decisive effect, because the Court did nothing of the sort. In discussing the absence of South Dakota's participation in the relevant market, the Court expressly stated that this factor is *not* dispositive, citing the very precedent on which South Dakota now relies:

> The antitrust laws were enacted for "the protection of *competition*, not *competitors*." [citation omitted] (original emphasis). This does not mean that the statute confines its protection solely to consumers, competitors, buyers, and sellers. [*Blue Shield of Virginia v.*] *McCready*, 457 U.S. at 472 (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)). *See also Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1086 (6th Cir. 1983) (finding that plaintiff is not direct participant in relevant market not dispositive of section 4 standing issue).

SD App. 14a n.16. Although the Eighth Circuit notes—consistent with this Court's instructions[7] and the views

[7] *See Associated General Contractors*, 459 U.S. at 539.

of other circuits—that a party's lack of participation in the relevant market "must be weighed heavily against a grant of standing," the Court remained cognizant of the fact that "[s]tanding determinations must be made on a case by case basis." SD App. 14a n.16.

Consequently, South Dakota's lack of participation in the market restrained was not the only factor the Court below considered and addressed. The opinion of the lower court addresses in some measure *each* of the factors it derives from *Associated General Contractors*. The opinion lists six factors:

> (1) the causal connection between the alleged antitrust violation and the harm to the plaintiff; (2) the existence of an improper motive; (3) whether the injury was of a type that Congress sought to redress with the antitrust laws; (4) the directness of the connection between the injury and the alleged restraint in the relevant market; (5) the speculative nature of the damages; and (6) the risk of duplicative recoveries or complex apportionment of damages.

SD App. 12a. The decision below assumes *arguendo* that the first two of these factors weighed in South Dakota's favor. *See* SD App. 12a-13a (assuming "that South Dakota's injuries were in some way causally connected to KCS' allegedly anticompetitive conduct") and SD App. 13a ("for the purposes of our analysis, we grant the assumption that KCS' activities were improperly motivated").[8] As to the last two factors, the panel suggests

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[8] South Dakota exaggerates the significance of the second factor with the misleading statement that "[c]ancellation of the *contract* . . . became a principal objective of KCS' campaign." Pet. at 11 (emphasis added). There were *two* water contracts. Although KCS sought to invalidate ETSI's contract with the *Bureau of Reclamation*, KCS did not sue South Dakota in *Andrews* nor assert there that ETSI's contract with *South Dakota* was unlawful. Thus, KCS' "principal objective" was judicial invalidation of ETSI's federal, not state, contract.

these weighed in KCS' favor. *See* SD App. 13a-14a & n.15 (discussing the presence of more directly injured plaintiffs, which creates a risk of duplicative recovery) and SD App. 19a n.20, 26a-27a n.28 (discussing the highly speculative character of South Dakota's derivative damage claim).[9]

Given this relative balance among these four factors, the panel necessarily focused carefully on the remaining two: "whether the injury was of a type that Congress sought to redress with the antitrust laws," and "the directness of the connection between the injury and the alleged restraint in the relevant market." SD App. 12a. Following this Court's decisions in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), and *Associated General Contractors*—as well as decisions of other Courts of Appeals—the panel determined that South Dakota's lack of a direct economic stake in the extent or intensity of competition in the coal transportation market weighed heavily against its standing to recover treble damages for an alleged restraint in that market, and that South Dakota was in no different posi-

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[9] Rearguing this point, South Dakota asserts that "the damages were in effect fixed by contract and easy to calculate" without "complex apportionment." Pet. at 15. The Eighth Circuit explained, however, that the ETSI/South Dakota contract did not "fix" South Dakota's damages because the contract's various cancellation rights made it "terminable at ETSI's will." SD App. 26a n.28. *See also* SD App. 7a, 17a. To determine South Dakota's injury, the jury needed to ascertain whether ETSI would have exercised its cancellation rights, which depended on how successful the project would have been. The Court below described what an exceedingly complex task this determination would be based on the record below, finding the existence of facts critical to South Dakota's 50-year damage theory to be "entirely speculative." SD App. 26a-27a n.28. Although the Court discusses the complexities of South Dakota's damage theory primarily in its tort analysis, SD App. 27a n.28, it summarizes these same concerns in its standing analysis. *See* SD App. 19a n.20.

tion than any other prospective supplier of inputs to ETSI, *e.g.*, pipe suppliers, banks or labor unions. SD App. 14a-20a. South Dakota concedes, as it must, that "[d]irect participation by the plaintiff in the restrained market may be an important factor" in according antitrust standing (Pet. at 13); given all the factors of this matter, the lack of such participation necessarily became an important factor in this case.

In the end, the objection is that the Court of Appeals was unpersuaded that South Dakota should have been accorded standing because, factually, it could have been regarded as an important supplier to ETSI. By any measure, this is an entirely fact-specific issue unique to this action, and is hardly appropriate for this Court's review.

II. THE DECISION BELOW APPLIED SETTLED PRINCIPLES OF *NOERR-PENNINGTON* LAW

In straining to justify this Court's review of issues concerning its state tort claim, South Dakota mischaracterizes the holding of the Eighth Circuit in this case and the case law governing *Noerr-Pennington* generally. First, the Eighth Circuit's *Noerr* holding was alternative to its causation holding that KCS' activities did not proximately cause South Dakota's injury. The States of Iowa, Nebraska and Missouri independently caused any harm inflicted by the *Andrews* litigation, and there is simply no evidence that non-*Andrews* petitioning pursued after December 23, 1981 caused the cancellation of the contract. SD App. 28a, 37a. The decision's own characterization of its holding demonstrates—contrary to South Dakota's suggestion, *see* Pet. at 18 n.17—that lack of proximate cause is a fully sufficient basis for dismissal of the tort claim. *See* SD App. 26a-27a ("We hold as a matter of law that KCS' activities . . . (1) had no significant or proximate causal relation to the cancellation by ETSI of the [South Dakota]/ETSI contract."); SD App. 28a

("This [causation] determination renders KCS' motive in pursuing its right to join in the [*Andrews*] suit *irrelevant*.") (emphasis added).[10] Grounded in state law, the Court's holding provides an adequate and independent basis for dismissing the tort claim. Thus, the *Noerr-Pennington* holding is not necessary to the result reached below.

Second, even if it were relevant to the result, the particular basis for the Eighth Circuit's *Noerr-Pennington* ruling does not conflict with the decisions of this Court or any other Court of Appeals. The Court below held that KCS' *Andrews* petition was protected as a matter of law because the record evidence concerning KCS' subjective intent was insufficient to satisfy the uniform test for sham intent. The Court did not apply any rule, "absolutist" or otherwise, looking to the objective merit of KCS' petition. To the extent any decisional conflict exists regarding such

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[10] The Court below did not "recognize," as South Dakota claims, Pet. at 18 n.17, that KCS' efforts in *Andrews* "went beyond assertion of its own standing." Noting that another railroad had financially assisted the State of Nebraska in *Andrews*, the Court below stated: "[*a*]*ssuming* the record would support a similar factual finding with regard to KCS in the present case, we move to the second ground of our holding," *i.e.*, the one based on *Noerr*. SD App. 29a (emphasis added). For the *Noerr* ruling to be necessary to the judgment, such a factual finding would have to be made, not "assum[ed]." The jury was not asked to make and made no finding whether KCS proximately caused the States of Iowa, Nebraska and Missouri to pursue their *Andrews* petition, nor whether the States' decision to litigate was the result of a "conspiracy" with KCS. South Dakota did not argue for such a finding in its Petition, nor would the record support such a finding.

Additionally, although the Court below did not "pass" on the specific issue of South Dakota's right to market Oahe water without Army approval, SD App. 26a n.28, *see also* SD App. 16a n.17, the Court did pass on the sufficiency of South Dakota's proof of damages. After extended discussion, the Court concludes: "We . . . find that the jury's award of damages [was] in no way supported by substantial evidence in the record." SD App. 27a n.28.

a rule, it is not implicated by or relevant to the decision in this case.

A. There Is No Conflict Over The Element Of Intent Necessary To Prove Sham Petitioning

South Dakota attempts to manufacture a conflict between this Court's decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S.Ct. 1931 (1988) ("*Allied Tube*"), and the decisions of several circuits, including the decision below, regarding the element of intent necessary to prove sham petitioning. South Dakota essentially concedes that the Courts of Appeals apply a uniform rule that protects petitioning, notwithstanding anticompetitive motive, as long as the petitioner sincerely intended to persuade governmental officials.[11] Nor does

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[11] Plaintiffs make no claim of a circuit conflict, but cite, as *consistent* with the Eighth Circuit rule applied below, decisions from the Fifth, Sixth and Ninth Circuits. Pet. at 18-19. Under its reading of *Allied Tube*, South Dakota challenges not only the holdings of those Circuits, but of every other Court of Appeals. *See Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 488 (1st Cir. 1988) (petition protected "'even though intended to eliminate competition'"), *cert. denied*, 109 S. Ct. 789 (1989); *Lease Lights, Inc. v. Public Serv. Co.*, 849 F.2d 1330, 1335 (10th Cir. 1988) (petition protected "even if its goals are anticompetitive"), *cert. denied*, 109 S. Ct. 817 (1989); *St. Joseph's Hosp. v. Hospital Corp. of America*, 795 F.2d 948, 954 (11th Cir. 1986) (petition right exists "even if [petitioner] only had an anti-competitive motive"); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 791 F.2d 288, 292 (4th Cir. 1986) (petition protected "'even though intended to eliminate competition'"); *MCI Communications Corp. v. American Tel. and Tel. Co.*, 708 F.2d 1081, 1156 (7th Cir.) ("'Without a doubt, the intention to harm a competitor is *not* sufficient to make litigation . . . a sham. That anticompetitive motive is the very matter protected under *Noerr-Pennington*.'"), *cert. denied*, 464 U.S. 891 (1983); *Litton Systems, Inc. v. American Tel. and Tel.*, 700 F.2d 785, 806 (2d Cir. 1983) ("anticompetitive intent [does] not make an otherwise legitimate attempt to secure governmental action . . . illegal"), *cert. denied*, 464 U.S. 1073 (1984); *Federal Prescription Service v. American Pharm. Ass'n*, 663 F.2d 253, 262 (D.C. Cir. 1981) ("Anticompetitive intent alone is not enough"), *cert. denied*, 455 U.S. 928

South Dakota deny that this uniform rule is consistent with this Court's decisions in *Noerr* and *Pennington*. Instead, South Dakota argues that, in 1988, *Allied Tube* "definitively rejected" this test for sham intent and authorized a finding of sham petitioning even where the petitioner sincerely intended to persuade a governmental official. Pet. at 19. Based on its novel reading of *Allied Tube*, South Dakota argues that a "sham" determination requires some undefined consideration of both the intent to persuade *and* anticompetitive motive. Pet. at 20.

South Dakota has only lately come to this view of *Allied Tube*. In the Court below, South Dakota advocated the precise rule it now attacks,[12] and informed the Eighth Circuit that *Allied Tube* stated "*the same standard* that has been applied in this circuit with respect to the sham exception." Appellees' And Cross-Appellants' Brief, at 30 ("SD Brief below") (emphasis added). South Dakota's current reading mischaracterizes the decision. Properly understood, *Allied Tube* presents no conflict with *Noerr* or *Pennington*, but supports the uniform rule of sham intent embraced by the decision below.

In *Noerr* there was no question but that the defendants had an anticompetitive motive: the trial court there found that the railroad defendants' "*sole* purpose" was "to destroy the truckers as competitors." 365 U.S. at 138 (emphasis added). Nonetheless, this Court reasoned that "it is neither unusual nor illegal for people to seek action on

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(1982); *Duke & Co. v. Foerster*, 521 F.2d 1277, 1281-82 (3d Cir. 1975) (rejecting claim that *Noerr* protected petitioning "only where there was not a specific illegal intent or purpose inherent" in the petition).

[12] Quoting Eighth Circuit precedent, South Dakota informed the Court below that "'[t]he essential element of the sham exception . . . is an absence of a genuine effort to influence government.'" SD Brief below, at 30 (ellipses in original). Nor did South Dakota urge its new reading of *Allied Tube* upon the Eighth Circuit in its petition for rehearing.

laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors," and held that "at least insofar as the [defendant] railroads' campaign was directed toward obtaining governmental action, its legality was not *at all* affected by any anticompetitive purpose it may have had." 365 U.S. at 139-40 (emphasis added). The Court raised and rejected the applicability of a "sham" exception, noting simply that "[n]o one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices." *Id.* at 144. In *Pennington*, the Court reviewed the decision in *Noerr* and stated: "*Nothing could be clearer* from the Court's opinion than that anticompetitive purpose did not illegalize the conduct there involved. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. 669-70 (emphasis added).[13] *Noerr* and *Pennington* refute the claim that anticompetitive motivation is ever sufficient to prove petitioning sham.[14]

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[13] In contrast, this Court held that a complaint may state an antitrust claim based on the sham exception where "the allegations are *not* that the conspirators sought 'to influence public officials,' but that they sought to bar their competitors from meaningful access to adjudicatory tribunals." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511-12 (1972) (emphasis added). This case simply does not stand for the proposition South Dakota believes it reflects. Pet. at 23.

[14] Properly understood, there is no conflict or trade-off between the legitimate intent to influence governmental action and the motive to harm competitors. One can fully intend to procure favorable governmental action for the sole purpose of harming a competitor; such a "mix" of intent and motive is what *Noerr-Pennington* protects. A petition is sham when the petitioner lacks the intent to influence governmental action, and intends to injure a competitor merely by the existence, rather than the outcome, of the petition. *See* P. Areeda & H. Hovenkamp, Antitrust Law, ¶¶ 203.1a, 203.1c, at 16, 19 (Supp. 1989).

In *Allied Tube*, this Court was *not* presented with an application of the sham exception to petitioning activity presumptively protected by *Noerr*, but the threshold question whether *Noerr* protection applied at all, given the nature and context of the activity challenged. The defendants in *Allied Tube* had not communicated directly with government officials (*e.g.*, by filing pleadings with a court), but had instead exercised "decision-making authority" in formulating a product standard for electrical conduits for a private trade association (by "packing" the association with pre-committed voters). 108 S.Ct. at 1935, 1942. This Court immediately noted that the case did not present a question of whether the petitioning of public officials was sham,[15] but whether the defendants' efforts to influence *private* persons (other members of the trade association) could be properly characterized as "incidental to" an effort to influence governmental action. *Id.* at 1937-38.

Recognizing that their private efforts to influence trade association members were not traditional "petitioning," the defendants advocated an "absolutist position" that *any* conduct—including private efforts to influence private persons—is protected if it is genuinely intended eventually to influence governmental action. *Id.* at 1938. The Court rejected *this* absolutist position, noting that it might legitimize all sorts of private non-petitioning acts—even horizontal price-fixing—because of a potential motivation "ultimate[ly]" to influence governmental decisions. *Id.* at 1938-39. Because it decided that the private restraint imposed by the trade association was not "incidental to" an effort to petition governmental officials, the Court had no occasion to apply the sham exception. Thus, *Allied Tube* does not affect *Noerr*'s protection of conduct that is indisputably "petitioning," *i.e.*, direct communications

[15] "The effort to influence governmental action in this case certainly cannot be characterized as sham given the actual adoption of the 1981 Code into a number of statutes and local ordinances." 108 S.Ct. at 1938.

with government officials. *See id.* at 1942 (defendants "can, with full antitrust immunity, engage in concerted efforts to influence those governments through *direct* lobbying") (emphasis added).[16]

To the extent *Allied Tube* addressed the sham exception in dicta, it reaffirmed the settled understanding of sham intent. The Court criticized the dissent for its willingness to find that defendants' private conduct there was "incidental to" an effort to influence the government, while reserving the sham exception to guard against "flagrant abuse." *Id.* at 1941 n.10. Citing *Noerr*, the majority noted: "Such a use of the word 'sham' distorts its meaning and bears little relation to the sham exception *Noerr* described to cover *activity that was not genuinely intended to influence governmental action.*" *Id.* (emphasis added). *See also id.* at 1937 n.4 ("private action that is not genuinely aimed at procuring favorable governmental action is a mere sham"). The Court below properly relied on this dictum of *Allied Tube* in describing the scope of the sham exception. SD App. 23a (citing *id.* at 1937 n.4).

Allied Tube did not alter in the least *Noerr*'s test for sham intent. It would have been remarkable for this Court to have "definitively rejected" (Pet. at 19) its decisions in *Noerr* and *Pennington* and the uniform understanding of the Courts of Appeals on the test for sham intent without explicitly expressing its disapproval of those decisions. *See, e.g.*, 108 S.Ct. at 1936 (citing *Noerr* and *Pennington* with approval). South Dakota's remarkable reading of *Allied Tube* is contradicted by a proper reading of the case, by subsequent decisions and commen-

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[16] While disagreeing over the application of *Noerr* to the conduct at issue in *Allied Tube*, the dissent there noted this common ground with the majority. Even "the majority concedes" that business concerns could communicate directly to government officials "with impunity . . . even though they had anti-competitive motives in doing so." 108 S. Ct. at 1944 (White, J., dissenting).

tary interpreting *Allied Tube*,[17] and even by South Dakota's previous interpretation expressed to the Court below.

In the present case, South Dakota has never denied that KCS' activities in the *Andrews* litigation constituted direct "petitioning" of public officials to which the *Noerr-Pennington* doctrine applied. South Dakota's sole claim for KCS' liability for *Andrews* has always been its attempt to invoke the sham exception to *Noerr* immunity. The Court below simply applied the uniform test for sham to the facts presented, and found *Andrews* protected because KCS indisputably desired judicial relief. SD App. 31a.[18]

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[17] Apparently, South Dakota can locate no case embracing its view of *Allied Tube*. To the contrary, *see Smith v. Combustion Engineering*, 1988-2 Trade Cas. (CCH) ¶ 68,224, at 59,448 (6th Cir. 1988) (not for publication) ("*Allied Tube* does not speak to the present case, where the defendants resorted to the courts."), *cert. denied*, 109 S. Ct. 1316 (1989); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 488 (1st Cir. 1988) (contrasting *Noerr*, concerning "'efforts to influence *public* officials,'" with *Allied Tube*, concerning "efforts to influence *private*" organizations) (original emphasis), *cert. denied*, 109 S. Ct. 789 (1989); *Aurora Cable Communications, Inc. v. Jones Intercable, Inc.*, 720 F. Supp. 600, 602 (W.D. Mich. 1989) (citing *Allied Tube*, yet still holding *Noerr* protects petitioning "regardless of . . . anticompetitive intent or purpose to eliminate competition"). *See also* P. Areeda & H. Hovenkamp, Antitrust Law, ¶¶ 202, 206.2, at 14-16, 77-83 (Supp. 1989); 6 Von Kalinowski, Antitrust Laws and Trade Regulation § 46A.04, at 46A-26. Neither treatise reads *Allied Tube* as "definitively rejecting" (Pet. at 19) prior law.

[18] Sham intent is the absence of a desire to influence governmental action, *i.e.*, indifference to the outcome of the petition. The Court below did not actually hold, as South Dakota suggests, that *any* level of concern with the outcome protects a petition, but that *Andrews* was protected as a matter of law because "a *significant factor* in [KCS'] pursuing the action was the desire to obtain judicial relief." SD App. 31a (emphasis added). The Court did not address the possibility of a *de minimis* desire to obtain relief combined with an overriding indifference to the outcome of the litigation. Any legal rule for such a case would not affect the outcome of this case.

B. The Court Below Did Not Apply An "Absolutist" Rule Based On The Success Of A Petition

South Dakota asserts that there is a conflict among the circuits over the scope of the sham exception to the *Noerr-Pennington* doctrine. As demonstrated in the prior section, no conflict exists concerning the basis for the decision below: that petitions sincerely intended to persuade governmental officials cannot be the basis for liability. *See, supra*, n.11. To the extent that any conflict or potential conflict exists on any other issue—such as the relevance of the objective merit of the petition—it is irrelevant to the ruling below. The Eighth Circuit did not rely on, or even approve, any "absolutist" rule that "reasonable or successful litigation cannot be a sham." Pet. at 21. Even if this Court were to adopt the contrary rule that South Dakota urges—that successful suits can be sham—it would not alter the result reached below.

The Court below expressly avoided relying on the *per se* rule that petitioners attack. The decision specifically disavows the rule "that successful litigation shall categorically preclude a finding of sham." SD App. 30a n.30.[19] To the contrary, the Court below made abundantly clear that the ultimate basis of its holding was not the objective merit of KCS' petition, but KCS' subjective intent in petitioning: "[W]e must hold that no evidence exists in the record in this case to suggest that KCS did not possess the intent to succeed in the *Andrews* litigation." SD App. 31a. *See also* SD App. 30a n.30 ("[T]here really is no dispute that, regardless of its motive, KCS genuinely sought judicial relief."); SD App. 31a ("There is

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[19] At this point, the Court below quotes extensively and *with approval* from a Seventh Circuit case, *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983), a decision with which South Dakota suggests the decision below conflicts. Pet. at 21.

no evidence to prove that KCS' involvement in the *Andrews* litigation following December, 1981, was not significantly motivated by a desire to prevail on the merits."). Although the Court noted that KCS' *Andrews* petition had a "reasonable basis," SD App. 31a, it had no occasion to give this obvious fact dispositive significance, or to assign it *any* degree of significance, because of its holding regarding KCS' intent.[20]

At most, South Dakota can claim that the Court below "invoked" an Eighth Circuit case, *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484 (8th Cir. 1985), that attached some significance to the fact of success. Pet. at 21. Although the Court "invoked," *i.e.*, cited, *Razorback*, it most manifestly did not rely on the case for its holding. Immediately following the citation, the Court (a) expressly disavows a categorical rule that success bars a finding of sham, SD App. 30a n.30, and (b) states that "even if [it] were to apply [South Dakota's] interpretation of the Fifth Circuit's analysis" in *In re Burlington Northern, Inc.*, 822 F.2d 518, 528 (5th Cir. 1987), *cert. denied sub nom., Union Pacific R.R. v. Energy Transportation Systems, Inc.*, 484 U.S. 1007 (1988) ("*Burlington Northern*")—a case expressly holding that successful litigation *can* be sham—KCS' *Andrews* petition is still fully protected by *Noerr*. SD App. 30a-31a. The express basis for this holding is KCS' subjective intent, there being "no evidence" that KCS did not intend to prevail in *Andrews*. SD App. 31a.

South Dakota's claim that the decision below conflicts with the Fifth Circuit's decision in *Burlington Northern* is, consequently, untenable. Ruling on a pre-trial discovery order, the Fifth Circuit there held that successful

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[20] For the purposes of its opinion, the Court below did not even consider KCS to be "one of the successful parties" in *Andrews*. SD App. at 28a.

litigation *could* be sham *if* a plaintiff proved that the petitioner had lacked a desire to prevail as a significant motivating factor. *Burlington Northern*, 822 F.2d at 528. The Court below expressly accepted South Dakota's reading of that case, and still found *Andrews* protected because there was no evidence of sham intent. SD App. 30a. *See also* SD App. 28a-30a (decision below repeatedly citing *Burlington Northern* with approval). After stating the relevant test, *Burlington Northern* did not consider whether KCS did, in fact, desire to obtain judicial relief in *Andrews*. *Burlington Northern*, 822 F.2d at 528. There is, therefore, no conflict between *Burlington Northern* and the Eighth Circuit's finding, based on the specific voluminous record before it, that there was no evidence of sham intent.[21]

Because the Court did not rely on (or even approve) an "absolutist" rule that success bars a finding of sham, there is no conflict with South Dakota's interpretation of *California Motor, Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983) (*"Clipper Exxpress"*), or any other case cited by South Dakota. None of these cases holds that litigation genuinely intended to prevail can be sham, and therefore, none of the cases is inconsistent with the holding below. In *California Motor*, the Court upheld the sufficiency of a complaint that alleged, *inter alia*, that the defendants brought repetitive suits "'with or without probable cause,'" 404 U.S. at 512, *i.e.*, with indifference to the outcome. Such facts were

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[21] Even if there were conflicting factual determinations on the same *events*, they would not have been made on the same *record*. In contrast to the 10-week trial record before the Court below, "in *Burlington Northern* the parties were merely at the pre-trial stage and the Court was appraising sham litigation in terms of whether there was sufficient evidence . . . to allow discovery as to KCS' intent." SD App. at 30a. *See also Burlington Northern*, 822 F.2d at 522.

simply not proven in the present case where the Court found "no evidence" that KCS' *Andrews* petition "was not significantly motivated by a desire to prevail on the merits." SD App. 31a.[22]

Finally, South Dakota can cite nothing in the decision below for its baseless claim that the Eighth Circuit "immunized KCS' *entire* course of conduct on the basis of *one* 'successful' piece of litigation." Pet. at 22 (emphasis in original). Having avoided holding that the success of a petition does not bar a finding of sham as to that petition, *a fortiori* the Eighth Circuit did not hold that success on one petition bars liability for other unsuccessful petitions, or that success on one petition insulates related non-petitioning conduct from liability. The Court made no *Noerr* determination for any of KCS' conduct except *Andrews*.[23]

There is absolutely no basis for South Dakota's characterization of the holding below as providing an "absolutist" treatment of success. In its comprehensive search for a question that might conceivably meet this Court's criteria for granting review, South Dakota has ignored

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[22] *Clipper Exxpress* simply does not hold that "otherwise-protected litigation which is part of an overall anticompetitive scheme is not entitled to *Noerr-Pennington* immunity." Pet. at 23. Even the language South Dakota quotes makes clear that the Ninth Circuit is only rejecting a claim of "overall" immunity; it held that the defendants' *non-petitioning* "actions do not enjoy immunity, even though a part" of an overall anticompetitive scheme including protected petitioning. *See* 690 F.2d at 1265.

[23] Pre-December, 1981 conduct could not provide any basis for tort liability because, as South Dakota has conceded, KCS could not tortiously interfere with its contract with ETSI before the contract existed, and the contract did not exist until December 23, 1981. *See* SD App. 24a-25a. Nor does the Court anywhere determine whether KCS' post-1981, non-*Andrews* petitioning activity was protected by *Noerr*. No such determination was necessary because the Court held that KCS' post-1981 activities "had no significant or proximate causal relationship" to South Dakota's alleged injury. SD App. 27a.

the fundamental requirement that the decision below must have actually decided the question petitioners present.

III. THE COURT BELOW NECESSARILY AND CORRECTLY REVIEWED THE SUFFICIENCY OF THE EVIDENCE REGARDING DISPOSITIVE ISSUES

South Dakota also attacks the Court of Appeals' reversal of the tort judgment for its analysis of the record below with respect to the sufficiency of evidence (a) as to whether *Andrews* could be considered sham litigation, and (b) as to whether any of KCS' post-1981 non-*Andrews* petitioning was a proximate cause of ETSI's decision to terminate its contract with South Dakota. Attempting to create a significant "legal" issue out of these fact-intensive inquires, South Dakota raises the specter of a Seventh Amendment violation, claiming that the Eighth Circuit gave insufficient weight to jury findings on these issues. South Dakota's constitutional claim is wholly groundless. First, there are no jury findings on these issues because South Dakota objected to the necessary instructions and interrogatories. Second, even if there were such findings, the Court would have been entirely justified in setting them aside for lack of sufficient evidentiary support.

The trial court elected to seek a special verdict from the jury, rather than a simple general verdict or a general verdict accompanied by answers to special interrogatories. *See* Fed. R. Civ. P. 49(a). The jury found only those facts it reported in answering the questions on the special verdict form, and made no general finding of liability. *See* SD App. 64a-68a. None of its answers includes a finding that KCS' petitioning was sham. KCS repeatedly asked the trial court to submit a question to the jury asking whether any or all of KCS' petitioning activity was sham. South Dakota *objected* to the inclusion of such a question, and the trial court, opining that "a decision on this *Noerr-Pennington* issue would not be dispositive," refused it. *See* KCS App. 1a-3a (refused

CONCLUSION

South Dakota has repeatedly misstated the basis for the decision below. Properly understood, the Court below only applied the settled law on each issue to the facts presented in the record, resolving any close legal questions in South Dakota's favor. There is no reason for this Court to review settled principles on which the decision rests, or other issues South Dakota presents on which the decision does not rest.

Respectfully submitted,

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petitioning activity, sham or not, was the proximate cause (in a "but-for" sense required by state law) of the cancellation of the Oahe water contract. The most South Dakota can assert in its Petition, without citation or support, is that there was some evidence that KCS' post-1981, non-*Andrews* petitioning activities "*contributed* to the harm to South Dakota." Pet. at 27 (emphasis added). Even if an exhaustive analysis of the entire record supported this carefully stated proposition, which KCS disputes, it would not cast the decision below in doubt; such a determination (never made by the jury) would in any event be insufficient to establish proximate cause under South Dakota tort law.

APPENDICES

APPENDIX A

DEFENDANTS' FINAL WRITTEN SUBMISSION CONCERNING JURY INSTRUCTIONS, FORM OF VERDICT AND INTERROGATORIES

[Refused orally by Judge John B. Jones at charge conference on March 31, 1988]

* * * *

Question 3: *Noerr-Pennington* and the sham exception

3. Do you find that plaintiffs have proved or failed to prove, by a preponderance of the evidence:

(A) That KCS's comments on ETSI's Environmental Impact Statement ("EIS") were *not* genuinely intended by KCS to pursuade the Bureau of Land Management to rule against ETSI?

Proved _____
Not Proved _____

(B) That KCS's defense of lawsuits brought by ETSI was *not* genuinely intended by KCS to persuade the Oklahoma court to rule against ETSI?

Proved _____
Not Proved _____

(C) That KCS's participation in the *Andrews* litigation against ETSI and the Bureau of Reclamation was *not* genuinely intended by KCS to pursuade the federal courts to rule against ETSI and the Bureau of Reclamation?

Proved _____
Not Proved _____

(D) That KCS's participation before various federal administrative agencies, such as the Bureau of Land Management, the Corps of Engi-

neers, the Environmental Protection Agency, and the United States Forest Service was *not* genuinely intended by KCS to pursuade these agencies to rule against ETSI?

Proved _____
Not Proved _____

(E) That KCS's participation before various state administrative agencies, such as the South Dakota Water Management Board, the Oklahoma Corporation Commission, the Oklahoma Water Resources Board and the Arkansas Department of Pollution Control and Ecology, was *not* genuinely intended by KCS to persuade these agencies to rule against ETSI?

Proved _____
Not Proved _____

(F) That KCS's participation before various local agencies, such as the Yuma County, Colorado Land Use Planning Board, was *not* genuinely intended by KCS to persuade these agencies to rule against ETSI?

Proved _____
Not Proved _____

(If you answer all of the above "not proved," go to Question 7 and check "for defendants," and then go to Question 10 and check "for defendants". If you answer "proved" as to any of the above, proceed to the next question).

* * * *

APPENDIX B

DEFENDANTS' ALTERNATE INTERROGATORY #3

[Submitted by Defendants on March 31, 1988 at charge conference]

Do you find that plaintiff has proved, by a preponderance of the evidence, that KCS's conduct before courts and governmental agencies was *not* genuinely intended to persuade judges and government officials to enter rulings and decisions favorable to KCS and unfavorable to ETSI?

_____ Yes _____ No

Refused, 3/31/88
John B. Jones [signed]

APPENDIX C

Defendants' Proposed Instruction No. 7

If you find that plaintiffs have not proved that some of defendants' petitioning was "sham", you should thereafter ignore any petitioning conduct as to which plaintiffs have not proved "sham." Such petitioning conduct, as I mentioned earlier, cannot violate the law and cannot be the legal cause of any injury. If you find that plaintiffs have not proved that any of defendants' petitioning conduct was "sham," then you need not consider the matter any further. In short, you must return a verdict for the defendants if you conclude that all of defendants' petitioning was sincerely intended to influence some governmental body.

Refused, 3/31/88
John B. Jones [signed]

Defendants' Proposed Instruction No. 8

If, however, you determine that plaintiffs have proved that some of defendants' petitioning activity was "sham" petitioning, you must go on to determine precisely which instances of petitioning were proved to be "sham" petitioning. If there are any such instances, and I do not by giving you this instruction mean to suggest that I believe there are, then this is the petitioning conduct upon which you should focus for the remainder of your deliberations. Any petitioning conduct that you find to be genuine should not be further considered by you, insofar as plaintiffs' claim of injury is concerned.

Refused, 3/31/88
John B. Jones [signed]